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NOTICE OF MOTION AND MOTION TO DISMISS GOVERNMENT'S NOTICE OF INTENT TO SEEK DEATH PENALTY AND FOR OTHER APPROPRIATE RELIEF

October 25, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT of CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, V. THEODORE JOHN KACZYNSKI, Defendant.	CR-S-96-259 GEB Date: October 24, 1997 Time: 1:30 p.m. Hon. Garland E. Burrell, Jr.

TABLE OF AUTHORITIES

STATE CASES

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MISCELLANEOUS

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To: ROBERT J. CLEARY, STEPHEN P. FRECCERO, BERNARD F. HUBLEY, R. STEVEN LAPHAM,
Special Attorneys to the United States

Attorney General:

Please take notice that on October 24, 1997, at 1:30 p.m., before the Honorable United States District Judge Garland E. Burrell, Jr., defendant Theodore John Kaczynski, through counsel Quin Denvir and Judy Clarke, will move the Court to dismiss the government's notice of intent to seek the death penalty, which was filed on May 15, 1997, and for other appropriate relief as set forth herein. The grounds for this motion are set forth in the attached memorandum in support of the motion. A motion to preclude imposition of the death penalty is being filed separately.

This motion is based on the instant motion, the accompanying memorandum in support of the motion, and on any other evidence or argument presented before or at the hearing on the motion.

Dated: September 15, 1997

Respectfully submitted,
QUIN DENVER (signature)
JUDY CLARKE (signature)

Attorneys for Defendant
Theodore John Kaczynski

INTRODUCTION

Defendant Theodore Kaczynski is charged in a 10-count indictment with various federal offenses arising out of four separate explosives incidents. Pursuant to 18 U.S.C. § 3593 (a) , in any case in which the government intends to seek the death penalty, the government must file a notice that sets forth the aggravating factor or factors that it proposes to prove to justify a death sentence ("death penalty notice") On May 15, 1997, the government filed such a notice in which it stated that it intends to seek the death penalty in the event that Mr. Kaczynski is convicted of the explosive incident that is alleged in counts eight and nine of the indictment. Count eight charges defendant with transportation of an explosive in interstate commerce in violation of 18 U.S.C. § 844(d) while count nine charges him with mailing the same explosive in violation of 18 U.S.C. § 1716.

The death penalty notice first alleges that the defendant acted with the mental state or states required to establish eligibility for a death sentence. 18 U.S.C. § 3591(a)1 (1); see also Tison v. Arizona, 481 U.S. 137 (1987) (Eighth Amendment does not prohibit death penalty as disproportionate where defendant had major participation in felony that results in murder and whose mental state is reckless indifference to human life) . The notice calls these "preliminary factors." The notice also alleges three aggravating factors enumerated in 18 U.S.C. § 3592(c) ("statutory") and five aggravating factors that are not set forth in the statute ("non-statutory") as follows:

Statutory Aggravating Factors:

- 1. The death, or injury resulting in death, occurred during the commission or attempted commission of an offense under 18 U.S.C. § 844(d) which prohibits transportation of an explosive device in interstate commerce with intent to kill. 18 U.S.C. § 3592(c) (1)
- 2. The defendant, in the commission of the offense knowingly created a grave risk of death to one or more persons in addition to the victim of the offense. 18 U.S.C. § 3592(c) (5).
- 3. The defendant committed the offense after substantial planning and premeditation to cause the death of one or more persons and to commit an act of terrorism. 18 U.S.C. § 3592(c) (9).

Non-Statutory Aggravating Factors:

With respect to these preliminary factors, the notice states as follows:

Pursuant to 18 U.S.C. § 3591(a) (2), the United States will rely on the following preliminary factors to establish the defendant's eligibility for the death penalty:
1. The defendant intentionally killed the victim. 18 U.S.C. § 3591(a) (2) (A).
2. The defendant intentionally inflicted serious bodily injury that resulted in the death of the victim. 18 U.S.C. § 3591(a) (2) (B).
3. The defendant intentionally participated in an act contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other

than one of the participants in the offense, and the victim died as a direct result of the offense. 18 U.S.C. § 3591(a) (2) (C)
4. The defendant intentionally and specifically engage in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act. 18 U.S.C. § 3591(a) (2) (D).

- 1. The defendant has committed two other murders and numerous other significant acts of violence and attempted acts of violence and has made threats of violence against others.
- 2. The defendant has a low potential for rehabilitation.
- 3. The defendant lacks remorse for any of the murders and other acts of violence which he has committed.
- 4. The defendant represents a continuing danger to the lives and safety of other persons.
- 5. The defendant caused severe and irreparable harm to the families of three murder victims and caused life. altering injuries to the survivors of his acts of violence.

RELEVANT LAW

A constitutional death penalty statute must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (Zant v. Stephens, 462 U.S. 862, 877 (1983).) (2) The statute must "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed' guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" (Lewis v. Jeffers, 497 U.S. 764, 774 (1990) (quoting Godfrey, 446 U.S. at 428).)

A statute's aggravating factors play a critical role in channeling the sentencer's discretion through clear and objective standards. An aggravating factor must set out a clear, principled way to distinguish those few cases in which the death penalty may be imposed from the many cases which it is not imposed. (Godfrey, 446 U.S. at 428-29, 433.) As the Court has instructed,

> "Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the

2. In general, the requisite narrowing can be accomplished in two ways: "The legislature may itself narrow the definition of capital offenses . . . so that the jury finding of guilt responds to this concern," or "the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase."

> sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance.

(Lowenfield v. Phelps, 484 U.S. 231, 246 (1988).)

(Stringer v. Black, 503 U.S. 222, 235-36 (1992).) Following these principles, the Court has struck down aggravating factors that are too vague to supply clear guidance or that could be interpreted as applying to almost any murder. (See, e.g., Maynard v. Cartwright, 486 U.S. 356 (1988) (holding Oklahoma's "especially heinous, atrocious, or cruel" aggravating factors unconstitutionally vague) ; Godfrey, 446 U.S. 420 (holding Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravating factor unconstitutionally vague) .)

In a jurisdiction with a weighing statute, like the federal statute here, "there is Eighth Amendment error when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose the death sentence." (Sochor v. Florida, 504 U.S. 527, 532 (1992).) "Employing an invalid aggravating factor in the weighing process 'creates the possibility . . . of randomness,' by placing a 'thumb [on] the death's side of the scale,' thus 'creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty.'" (Id. at 532 (quoting Stringer, 503 U.S. at 232, 235, 236 (citation omitted)).

ARGUMENT

I. The Government's Death Penalty Notice In This Case Must Be Dismissed Because It Fails To Provide The Notice Required By The Constitution And By 18 U S.C. § 2593(a).

In any case in which the government intends to seek the death penalty, 18 U.S.C. § 3593 (a) (2) requires the government to file a notice "setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a death sentence." When criminal charges are filed, Federal Rule of Criminal Procedure 7(c) (1) requires that the filing provide notice of the nature of the charges, consisting of a "plain, concise and definite written statement of the essential facts." Notice is also a bedrock principle under the Due Process Clause and the Sixth Amendment. See Simmons v. South Carolina, 512 U.S. 154, 175 (1994) ("'Capital sentencing proceedings must of course satisfy the dictates of the Due Process Clause,' and one of the hallmarks of due process in our adversary system is the defendant's ability to meet the State's case against him.") (O'Connor, J., concurring) (quoting Clemons v. Mississippi, 494 U.S. 738, 746 (1990)); United States v. Kurka, 818 F.2d 1427, 1431 (9th Cir. 1987) ("The Sixth Amendment requires that a defendant be informed of 'the nature and cause of the accusation.'")

Here the government's death penalty "notice" is wholly insufficient to

apprise Mr. Kaczynski of the nature of the aggravating factors that the government intends to rely on to sentence him to death. See Givens v. Housewright, 786 F.2d 1378, 1380 (9th Cir. 1986) ("The sixth amendment requires, in part, that an information state the elements of an offense with sufficient clarity to apprise a defendant of what he must be prepared to defendant against") (emphasis added). For example, the second alleged statutory aggravating factor states that defendant knowingly created a grave risk of death to other persons--but does not specify which other persons, or provide other essential details concerning the scope of this factor. Does the government allege that every person who came near Mr. Kaczynski while he allegedly transported an explosive from Montana to Oakland was subject to a grave risk of death? Likewise, the third alleged statutory aggravating factor states that the defendant committed the offense after substantial planning and premeditation, but does not identify any conduct that supposedly supports this factor.

The notice concerning the alleged non-statutory aggravating factors is equally lacking. The first alleged nonstatutory aggravating factor states that defendant committed "two other murders and numerous other significant acts of violence and attempted acts of violence and has made threats of violence against others," while the fifth alleged non-statutory aggravating factor similarly states that defendant caused severe and irreparable harm to the families of three murder victims and caused life altering injuries to the survivors of his acts of violence. The notice, however, provides no names, dates, places, etc. concerning the broad allegations set forth in these aggravators. The notice is utterly lacking in the information necessary for the defense to adequately prepare to defend against these factors. Moreover, other alleged non-statutory aggravating factors use such vague terms as "low potential for rehabilitation," "lacks remorse," and "continuing danger," so as to make the government's "notice" essentially meaningless.(3)

Fair notice has been a fundamental principle in our constitutional law for more than a century. In United States v. Cruikshank, 92 U.S. (2 Otto) 542, 23 L.Ed. 588 (1876), the Supreme Court held that portions of an indictment were invalid for lack of fair notice, even though the indictment set forth the elements of the offense in the language of the applicable statute, i.e., intentionally hindering particular citizens in their "free exercise and enjoyment of . . . the several rights and privileges granted and secured to them by the constitution and laws of the United States." Id. at 557. The indictment was defective because it did not specify which of the many constitutional rights had been taken from the alleged victims. The Court explained that when an offense "includes generic terms," the indictment must do more than repeat those terms; "it must state the species,--it must descend to particulars." Id. at 558.

In this case, the government's notice suffers from the same infirmities found fatal in Cruikshank.

3. In other federal capital cases, the prosecution has been far less stingy in providing information concerning the aggravating factors alleged in its death penalty notice. See United States v. Spivey, 958 F. Supp. 1523, 1535 (D. N.M. 1997) ("The Notice lists five acts of violence with specific dates, names of victims or intended victims, and descriptions of the acts themselves.") ; United States v. Davis, 912 F. Supp. 938, 950-53

The notice repeats the general language set forth in the statutory aggravating factors and defines the non-statutory aggravating factors in vaguer, generic language. Especially in a capital case where the need for reliability is paramount, the government's notice falls far short of the notice required by our Constitution and federal laws.

(E.D. La. 1996) (death penalty notices set forth in appendix).

Alternatively, in the event the notice is not dismissed, the Court should order a bill of particulars pursuant to Federal Rule Criminal Procedure 7(f), requiring the government to provide sufficient details concerning the nature of the aggravating factors alleged in the notice.(4) A request for a bill of particulars requires no showing of cause. (5) The test is "whether it is necessary that defendant have the particulars sought in order to prepare his defense and in order that prejudicial surprise will be avoided." 1 Wright, Federal Practice and Procedure § 129, at 436 (1982) (footnote omitted) . "A defendant should be given enough information about the offense charged so that he may, by the use of diligence, prepare adequately for the trial." Id. at 436-37.

Even in a non-capital trial, when the government intends to present evidence of "other crimes, wrongs, or acts" of the defendant, the government is required to provide pretrial notice of the "general nature of any such evidence it intends to introduce at trial." Fed. R. Evid. 404(b). It is inconceivable that the federal death penalty statute should be interpreted as allowing the government to provide less notice of a defendant's alleged "other acts" for the penalty phase of a capital trial, where a jury determines whether the defendant shall live or die. For the defense to prepare adequately in this case, the Court should grant a bill of particulars ordering the government to provide notice as follows: (1) with respect to each person or act or event referred to in the death penalty notice, identifying the name of each person and the date, place and general nature of each act or event; (2) specifying the general nature of the evidence it intends to rely on to support a finding that defendant committed the offense "after substantial planning and premeditation," "lacks remorse," has a "low potential for rehabilitation," and is a "continuing danger" to others; and (3) identifying and describing the general nature of the evidence purporting to show "severe and irreparable harm" to victims' families and "life altering injuries to the survivors of his acts of violence."

4. To the extent that the notice required by section 3593 (a) must be returned by a grand jury, see separately filed Motion to Preclude Imposition of Death Penalty, Argument Section I, a bill of particulars cannot substitute for a valid indictment. United States v. Cecil, 608 F.2d 1294, 1296 (9th Cir. 1979).

5. Fed. R. Crim. P. 7(f) was amended in 1966 to eliminate the requirement that a bill could be ordered only "for cause." The amendment was intended "to encourage a more liberal attitude by the courts towards bills of particulars." Advisory Committee Note to the 1966 Amendment of Rule 7 (f).

II. The Statutory Aggravating Factors Alleged In The Government's Death Penalty Notice Must Be Dismissed As Duplicative, Vague, and Overbroad.

1. The first statutory aggravating factor -- The death, or injury resulting in death1 occurred during the commission or attempted commission of an offense under 18 U.S.C. S 844(d) which prohibits transportation of an explosive device in interstate commerce with intent to kill. 18 U.S.C. § 3592(c) (1).

An aggravating factor that merely duplicates the capital crime violates the Eighth Amendment because it fails to genuinely narrow the class of persons who should be selected for the death penalty. A jury finding of an aggravating factor that merely replicates the underlying crime does not in any way distinguish one sentenced to death from one sentenced to a term of imprisonment. Under a weighing statute, such as the federal statute here, employing duplicative aggravating factors also unfairly pre-weighs the scales in favor of death, because the jury must necessarily find the existence of the aggravator when finding the defendant guilty of the capital crime.

Here, the government seeks the death penalty in the event that Mr. Kaczynski is convicted of count eight, transportation of an explosive in interstate commerce with intent to kill or injure in violation of 18 U.S.C. § 844(d), resulting in death. The first aggravating factor duplicates this offense. As a result, if the jury finds Mr. Kaczynski guilty of count eight, it would automatically find the existence of one statutory aggravating factor.

For this reason, in United States v. McVeigh, 944 F. Supp. 1478 (D. Col. 1996), Judge Matsch agreed with the defendants and prohibited the government from using any of the crimes charged in the indictment as aggravating factors:

> "Because the Court has held that the weighing process is highly sensitive to the influence of aggravating factors that might unfairly tip the scales in favor of death, the government may not introduce those offenses as aggravating factors that duplicate the crimes charged in the indictment. To allow the jury to weigh as an aggravating factor a crime already proved in a guilty verdict would unfairly skew the weighing process in favor of death."

Id. at 1489-90; cf. Lowenfield v. Phelps, 484 U.S. 231 (1988) (in non-weighing statute, no Eighth Amendment violation where aggravating factor duplicates charged crime) . State courts have also found that "double-counting" the elements of a crime as an aggravating factor is unconstitutional. See Middlebrooks v. Tennessee, 840 S.W.2d 317 (Tenn. 1992), cert dismissed, 113 S. Ct. 651 (1992); State v. Cherry, 257 S.E.2d 551 (N.C. 1979), cert denied, 446 U.S. 941 (1980). Thus, the Court should dismiss the first alleged aggravating factor.

Moreover, the first alleged statutory factor does not apply to this case. To fall within the scope of the aggravating factor set forth in 18 U.S.C. § 3592(c) (1), a death must occur "during the commission of or attempted commission of" one of several enumerated offenses, in this case,

transportation of an explosive in interstate commerce in violation of section 844(d). This language was not meant to apply to cases where the defendant's intent was to kill and transporting an explosive was merely the means to commit the crime, rather than an independent felony. In such cases, the death did not occur during the commission of the explosive offense, but was the object of the offense.

In People v. Green, 27 Cal.3d 1, 164 Cal. Rprt. 1, 609 P.2d 468 (1980), the California Supreme Court reached the same conclusion in interpreting its state death penalty statute:

> "...it was not enough for the jury to find the defendant guilty of a murder and one of the listed crimes, the statute also required that the jury find the defendant committed the murder 'during the commission of or attempted commission of' that crime. . . . In other words, a valid conviction of a listed crime was a necessary condition to finding a special circumstance, but it was not a sufficient condition: the murder must also have been committed 'during the commission' of the underlying crime.
>
> * * *
>
> "...we infer that the purpose of the Legislature was to comply insofar as possible with what it understood to be the mandate of Furman and Gregg et al. At the very least, therefore, the Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not. The Legislature declared that such a distinction could be drawn, inter alia, when the defendant committed a 'willful, deliberate and premeditated' murder 'during the commission' of a robbery or other listed felony. . . The provision thus expressed a legislative belief that it was not unconstitutionally arbitrary to expose to the death penalty those defendants who killed in cold blood in order to advance an independent felonious purpose, e.g., who carried out an execution-style slaying of the victim of or witness to a holdup, a kidnapping, or a rape.
>
> "The Legislature's goal is not achieved. however when the defendant's intent is not to steal but to kill and the robbery is merely incidental to the murder--'a second thing to it.' as the jury foreman said here--because its sole object is to facilitate or conceal the crime. . . . To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other listed felonies would be to revive 'the risk of wholly arbitrary and capricious action' condemned by the high

> court plurality in Gregg. . . . We conclude that regardless of chronology such a crime is not a murder committed "during the commission" of a robbery within the meaning of a statute."

27 Cal.3d at 59-62, 164 Cal. Rptr. at 37-39 (emphasis added); see also People v. Thompson, 27 Cal.3d 303, 321-25, 165 Cal. Rptr. 289, 298-300, 611 P.2d 883 (1980) (same)

Finally, the aggravating factor must be dismissed because, even assuming the allegations to be true, a death did not occur during the commission of a section 844(d) offense--but after the offense had ended. Count eight of the indictment charges that Mr. Kaczynski transported a bomb and bomb components from Montana, to Oakland, California, from on or about March 13, 1995, to on or about April 20, 1995. It also alleges that defendant mailed the bomb from Oakland on or about April 20, 1995, and that the bomb was delivered to Sacramento on or about April 24, 1995, where it was opened, exploded, and caused a death.

To qualify as an aggravating factor under section 3592 (c) (1) , a death must occur during the commission of or attempted commission of the offense of transportation of an explosive in interstate commerce with intent to kill in violation of 18 U.S.C. § 844(d). But here the transportation of the explosive in interstate commerce ended when the defendant purportedly brought the explosive to Oakland on or about April 20, 1995. See United States v. Wallach, 979 F.2d 912, 918 (2d Cir. 1992) (interstate transportation of stolen property (18 U.S.C. § 2314) "is complete when the defendant transports in interstate commerce property worth more than $5,000"), cert. denied, 508 U.S. 939 (1993). The death occurred four days later, after the bomb was allegedly mailed from Oakland to Sacramento four days earlier. Thus, the charged death occurred after the violation of section 844(d) was complete, not during the commission of or attempted commission of the offense.

2. The second statutory aggravating factor --The defendant, in the commission of the offense knowingly created a grave risk of death to one or more persons in addition to the victim of the offense. 18 U.S.C. § 3592(c) (2).

This aggravating factor violates the death penalty statute and the Fifth and Eighth Amendments because it is duplicative and vague.

A finding of the second aggravating factor, that the defendant knowingly created a grave risk of death to additional persons beyond the victim, duplicates both the first alleged statutory aggravating factor and the mental state preliminary factor set forth in 18 U.S.C. § 3591(a) (2) (D) . The gist of the first alleged aggravating factor is that the interstate transportation of explosives is so inherently dangerous that it justifies a sentence of death1 rather than life imprisonment. Given the potential lethal nature of explosives, any case where a defendant is convicted of knowingly transporting an explosive will almost always involve a "grave risk of death to one or more persons in addition to the crime." Thus, the first and second alleged aggravating factors simply place two different labels on the identical

conduct.

In weighing statutes, aggravating factors that are duplicative or substantially overlap one another are constitutionally invalId. "Such double counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." United States v. McCullah, 76 F.3d 1087, 1111, aff'd on denial of reh'g, 87 F.3d 1136 (10th Cir. 1996), cert. denied, 117 S. Ct. 1699 (1997); see also Parsons v. Barnes, 871 P.2d 516, 529 (Utah), cert denied, 513 U.S. 966 (1994); Cook v. Alabama, 369 So.2d 1251, 1256 (Ala. 1978). "While the federal statute at issue is a weighing statute which allows the jury to accord as much or as little weight to any particular aggravating factor, the mere finding of an aggravating factor cannot but imply a qualitative value to that factor." McCullah, 76 F.3d at 1112. Where a sentencer is asked to weigh a factor twice in its decision, "a reviewing court cannot 'assume it would have made no difference if the thumb had been removed from death's side of the scale.'" **Id.** (quoting Stringer, 503 U.S. at 232). Because the first two aggravating factors duplicate one another, they produce an unconstitutional skewing of the weighing process towards death.

6. The alleged mailing from Oakland to Sacramento on April 20, 1995, was purely intra-state. Thus, it could not be part of the offense of transporting an explosive in interstate commerce.

In addition, the second alleged statutory aggravating factor also impermissibly duplicates one of the "preliminary" mental state factors set forth in the death penalty notice, which states as follows:

> "The defendant intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act."

18 U.S.C. § 3591(a) (2) (D) (emphasis added) . This factor completely subsumes the second alleged statutory aggravating factor that charges that "[t]he defendant, in commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense." See 18 U.S.C. § 3592(c) (5) (emphasis added). This double counting of aggravating evidence in the federal statute tends "to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." McCullah 76 F.3d at 1111. This is true even though the mental state factors in section 3591(a) (2) are not formal aggravating factors. A jury will likely still treat its finding on the mental state factors as aggravation when weighing all the aggravating and mitigating circumstances to determine the appropriate sentence. A jury instructed to make two duplicative findings regarding whether a defendant "knowingly created a grave risk of death to one or more persons in addition to the victim of the offense" will likely give this factor more weight than it

warrants.

Furthermore, an aggravating factor's duplication of a mental state "preliminary" factor impermissibly skews the weighing process towards death. Before the jury considers whether any of the alleged statutory (or non-statutory) aggravating factors are present, the jury considers whether the defendant acted with one of the mental states required under section 3591(a)(2). Only if and after the jury finds beyond a reasonable doubt one of the requisite mental states, does the jury consider whether the government has established beyond a reasonable doubt the existence of aggravating factors. Where an aggravating factor duplicates one of the jury's earlier mental state findings, the jury necessarily will have found that the aggravating factor has been established before it starts weighing the relevant factors in reaching its decision on life or death. By giving the government an improper head-start in this manner, the second alleged statutory aggravating factor unconstitutionally skews the jury's weighing process towards death.

Moreover, this factor is unconstitutionally vague because there is no clear meaning to the term "grave risk" of death. When reviewing the adequacy of an aggravating factor, a court must first "determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer." Walton v. Arizona, 497 U.S. 639, 654 (1990). If so, the court determines whether the courts have defined the vague term, and if they have done so, whether their construction is constitutionally sufficient. Id.

Here the term "grave risk" of death provides no guidance to a sentencer. How does a grave risk differ from a standard risk of death? Because Congress and the courts have not attempted to reduce the ambiguity in this factor by giving the term "grave risk" a limiting construction, this statutory aggravating factor must be dismissed as unconstitutionally vague.

3. The third statutory aggravating factor--The defendant committed the offense after substantial planning and premeditation to cause the death of one or more persons and to commit an act of terrorism. 18 U.S.C.. § 3592(c) (9).

This factor is unconstitutionally vague and overbroad. Most intentional killings involve some planning and premeditation. The term "substantial" is facially invalid because it fails to adequately advise the jury what it must find in order to determine that this aggravating factor is present. "Substantial" may mean "considerable in amount" or "not seeming or imaginary, not illusive." Webster's Third New International Dictionary 2280 (1981). Moreover, the statute does not make clear whether substantial modifies only "planning" or both "planning and premeditation." Thus, the terms of the statute do not provide a clear, objective standard to guide the jury in its deliberations.

In Arnold v. Georgia, 236 Ga. 534, 224 S.E.2d 386 (1976), the Georgia Supreme Court held the aggravating factor that the defendant had a "substantial history of serious assaultive criminal convictions" to be unconstitutionally vague because applying the term "substantial" is highly subjective and could not be applied uniformly by sentencing juries. 236 Ga.

at 540-41, 224 S.E.2d at 391-92. In the federal statute, the word substantial is equally subjective and, without a meaningful limiting construction, juries are left with essentially unfettered discretion in determining whether to find substantial planning and premeditation.(7)

Likewise, the inherent ambiguity in the term "terrorism" amplifies the vagueness in this aggravating factor. Terrorism has neither a fixed meaning nor historic and common sense roots necessary to fix its meaning. If the definition of "act of terrorism" set forth in 18 U.S.C. § 3077 applies, (8) this phrase does not apply to the facts of the charged offense. On the other hand, under an Iowa statute, "terrorism" is committed when a "person, with the intent to injure or provoke fear or anger in another, shoots, throws, launches, or discharges a dangerous weapon at, into, or in a building . . . ." Iowa Code Ann. § 708.6 (1997). Under the Iowa definition of terrorism or one similar to it, the alleged mailing of an explosive would not qualify as an act of terrorism because the explosive was not shot, thrown, launched, or discharged-- but was mailed. Without any fixed meaning, the phrase "act of terrorism" is unconstitutionally vague.

III.
The Non-Statutory Aggravating Factors Alleged In The Government's Death Penalty Notice Must Be Dismissed.

1. The defendant has committed two other murders and numerous other significant acts of violence and attempted acts of violence and has made threats of violence against others.

As explained in section I, this non-statutory aggravating factor is deficient because it does not identify what other murders, significant acts of violence, attempted acts of violence, and threats of violence the defendant is alleged to have committed. The lack of adequate notice deprives Mr. Kaczynski of his rights under the federal statutes, as well as the Fifth, Sixth, and Eighth Amendments to the Constitution.(9) Further, this factor must be dismissed because it relies on allegations of unadjudicated criminal conduct, see Defendant's Motion To Preclude Imposition of Death Penalty, Argument section IV.

2. The defendant has a low potential for rehabilitation. In addition to a lack of adequate notice of the bases for this allegation, this non-statutory aggravator should be dismissed because it is (1) duplicative; (2) proper only in rebuttal of mitigation, not as aggravation; and (3) unconstitutionally vague.

At least two district courts have held that a "low potential for rehabilitation" aggravating factor

7. Mr. Kaczynski recognizes that other federal courts have found that this phrase is not so vague as to violate the Eighth Amendment. See, e.g., United States v. McVeigh, 944 F. Supp. 1478, 1490 (D. Cob. 1996); United States v. Walker, 910 F. Supp. 837, 849 (N.D. N.Y. 1995). New Hampshire appears to be the only state to use the identical phrase "substantial planning and premeditation" as an aggravating factor. N.H. Code Ann. § 630:5(VII)(f) (Supp. 1992). Since this language was added in 1991, the New Hampshire courts have not considered the constitutionality of this provision.

8. An "act of terrorism" is defined in 18 U.S.C. §

impermissibly double-counts the future dangerousness factor, which is the fourth non-statutory aggravating factor alleged in the death penalty notice in this case. See United States v. Nguyen, 928 F. Supp. 1525 (D. Ks. 1996); United States v. Davis, 904 F. Supp. 564 (E.D. La. 1995). (10) The courts in Nguyen and Davis succinctly described the double-counting flaw in the aggravating factors as follows:

> "The term 'low rehabilitative potential' is too vague. Rehabilitative potential for what? The only relevant issue would be DAVIS' rehabilitative potential for becoming a nonthreat to the health and safety of others. With that limitation, it becomes the converse of future dangerousness. It may therefore be combined with the second nonstatutory factor [future dangerousness], but it is not appropriate as a separate freestanding factor. Since this is a statute in which the jury is to 'weigh' aggravating factors versus mitigating factors, there is always the danger that one or more jurors will weigh by counting. Breaking out what is essentially one factor into separately itemized factors is unduly prejudicial and confusing."

Davis, 912 F. Supp. at 946.

> "While 'future dangerousness' and 'low potential for rehabilitation' are not identical, the two factors 'substantially overlap with one another.' . . . . The court is hard-pressed to imagine how a person convicted of murder who has a low potential for rehabilitation does not represent a continuing danger to the lives of others in the future. Conversely, it is tautological that a person who will represent a continuing danger to others also has a low potential for rehabilitation."

Nguyen, 928 F. Supp. at 1543-44.

Moreover, even if it were non-duplicative, the low

3077 as follows:

(1)"act of terrorism" means an activity that--

(A) involves a violent act or act dangerous to human life that is a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and appears to be intended--
(1) to intimidate or coerce a civilian population;
(2) to influence the policy of a government by intimidation or coercion; or
(3) to affect the conduct of a government by assassination or kidnapping; . . .

9. The government's failure to identify what conduct or events it intends to rely on to prove the existence of this factor prevents the defendant from adequately challenging this factor (and others) on other grounds. For example, if the government intends to present evidence of crimes that allegedly occurred long ago, the statute of limitations may bar the government from proving such ancient offenses. Or where the government seeks to rely entirely on

potential for rehabilitation factor may not be used as an aggravating factor because it is not a valid reason to sentence a person to death, rather than life imprisonment. A defendant's potential for rehabilitation and adjustment has been held to be a proper mitigating factor. See Hitchcock v. Dugger 481 U.S. 393 (1987) (Florida statute errs in failing to permit consideration of defendant's non-statutory mitigating evidence, including potential for rehabilitation) . Evidence of a defendant's lack of rehabilitative potential would be admissible in the appropriate case to rebut a defendant's proposed mitigating factor. But the absence of mitigating evidence of defendant's potential to be rehabilitated cannot also be used as a basis for finding an aggravating factor. See. e.g People v. Bonin, 46 Cal.3d 659, 700, 250 Cal. Rptr. 687, 709, 758 P.2d 1217 (1988) (absence of mitigating evidence does not constitute an aggravating factor); People v. Siripongs, 45 Cal.3d 548, 583, 247 Cal. Rptr. 729, 750, 754 P.2d 1306 (1988) (same) , cert denied, 488 U.S. 1019 (1989).(11) Indeed, under federal law, Congress has declared that imprisonment is not intended to promote rehabilitation. 18 U.S.C. § 3582(a) ("recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation") . Given that rehabilitation is not a proper purpose of imprisonment, it necessarily follows that a defendant's "low potential for rehabilitation" cannot be a valid justification for not choosing a sentence of life imprisonment. The prosecution's attempt to classify a matter that is irrelevant to the life or death decision as an aggravating factor violates the Eighth Amendment and Due Process Clause. See Zant,

admissions allegedly made by the defendant in order to prove a particular charge, the evidence may be inadmissible under the federal corpus delicti rule. Until the government specifies the conduct it intends to prove under this and other aggravating factors, the defense is unable to evaluate all potential challenges, and preserves the right to bring other challenges at a later date.

10. In addition to finding the "low potential for rehabilitation" factor impermissibly duplicative in Nguyen, U.S. District Judge Belot also found it improper for the same reasons in United States v. Chanthadara, 928 F. Supp. 1055, 1058 (D. Ks. 1996). Moreover, in United States v. Beckford, 962 F. Supp. 748 (E.D. Va. 1997), the government apparently recognized the constitutional error in alleging "low potential for rehabilitation," "lack of remorse," and "future dangerousness" as separate aggravating factors. The government correctly alleged only the "future dangerousness" aggravator. 962 F. Supp. at 765 n.18. The government apparently

11. In an analogous context, the government may be able to present evidence that a defendant did not suffer from any mental illness to rebut a defendant's purported mental health mitigating factor, but certainly could not use evidence of the defendant's clean bill of mental health as an aggravating factor. See Zant, 462 U.S. 862 (noting that it would be constitutionally impermissible to "attach[] the 'aggravating' label...to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness").

462 U.S. at 885 (death penalty statute may not "attach[] the aggravating label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process")

Finally, even if this factor was not invalid for other reasons, it is unconstitutionally vague. What does "low potential" for rehabilitation mean? How does it differ from "medium" potential? "Low potential" fails to provide sufficiently clear, objective standards to guide the jury in its penalty determination and pass constitutional scrutiny. Similarly, what does "rehabilitation" encompass? To be a model citizen, to not violate the laws, or to not kill again?

proffered that its evidence of the defendant's purported lack of remorse and low potential for rehabilitation would support its alleged future dangerousness aggravator--not as the basis for separate aggravating factors. Id; see also United States v. Spivey, 958 F. Supp. 1523, 1534-35 (D. N.M. 1997) (noting that evidence of "past violent acts" and "low rehabilitative potential" are listed in the government's notice as categories of evidence supporting the future dangerousness factor, not as independent aggravating factors).

3. The defendant lacks remorse for any of the murders and other acts of violence which he has committed. The lack of remorse factor violates Mr. Kaczynski's Fifth Amendment right to remain silent and his Fifth and Eighth Amendment rights to reliable sentencing. The Fifth Amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself. . ."

> "The Fifth Amendment protects the individual's right to remain silent. The central purpose of the privilege against compulsory self-incrimination is to avoid unfair criminal trials. It is an expression of our conviction that the defendant in a criminal case must be presumed innocent, and that the State has the burden of proving guilt without resorting to an inquisition of the accused."

Lefkowitz v. Cunningham, 431 U.S. 801, 810 (1977) (Stevens, J., dissenting) (footnote omitted) . A defendant may not punished for exercising his right to remain silent. Malloy v. Hogan, 378 U.S. 1, 8 (1981). The privilege also "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Griffin v. California, 380 U.S. 609, 615 (1965).

In a capital case, evidence that a defendant lacks remorse violates his Fifth Amendment right to remain silent. The lack of remorse aggravator unfairly penalizes the defendant who chooses to exercise his right to remain silent and places him in an unconscionable "Catch-22." To effectively rebut evidence presented by the prosecution in support of this aggravating factor, a defendant may believe he is obligated to testify that he feels remorse for the crimes for which he has been convicted. Otherwise, a jury may "penalize" the defendant by inferring that his silence demonstrates lack of remorse. On the other hand, to make a sincere showing of remorse, a defendant will almost certainly need to admit guilt of the capital offense for which he is convicted. In many cases, a genuinely remorseful defendant may desire to testify as to his remorse, but at the same time be unwilling to jeopardize his right to appeal or to waive his privilege with respect to other charges he may

face for the same conduct.(12) The admission of evidence of a defendant's lack of remorse improperly compels a defendant to testify in violation of his Fifth Amendment right or risk a death sentence for failing to do so. See Johnson v. Mississippi, 486 U.S. 578, 585 (1988) (death sentence "cannot be predicated . . . on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process'") (quoting Zant v. Stephens, 462 U.S. 862, 885 (1983)); Zant, 462 U.S. at 885 (aggravating factor is invalid where it "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected") In a capital case which requires a "heightened need for reliability, "the likelihood of error that results from forcing a defendant to make this Hobson's choice also creates an unacceptable risk that the defendant's sentence will not be reliably obtained or will be based on an impermissible reason in violation of the Eighth Amendment and principles of due process of law.(13) In Pope v. Florida, 441 So.2d 1073 (1984), the Florida Supreme Court barred evidence of a defendant's lack of remorse in aggravation in a penalty phase of a capital case to avoid just such "mistaken" sentences:

> "Unfortunately, remorse is an active emotion and its absence, therefore, can be measured or inferred only from negative evidence. This invites the sort of mistake which occurred in the case now before us--inferring lack of remorse from the exercise of constitutional rights. . . . Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor."

441 So.2d at 1078. (14) In United States v. Davis, 912 F. Supp. 938, 946 (E.D. La. 1996), the government's notice proposed to establish the defendant's lack of remorse with evidence demonstrating that the defendant "displayed absolutely no remorse" regarding the capital murder and in two telephone conversations "exulted in the murder." Id. at 951. The court prohibited the government from presenting lack of remorse as an

12. For example, in this case, the State of California might seek to charge Mr. Kaczynski with capital offenses arising out of the same conduct alleged in this proceeding. Moreover, Mr. Kaczynski already faces federal charges for Unabom offenses in New Jersey, Utah, Tennessee, and Michigan, and could face state charges for these offenses. Even if the Fifth and Eighth Amendments did not completely preclude all evidence of the defendant's alleged lack of remorse, any such evidence should be limited to the charged capital crime--not unadjudicated conduct or non-capital offenses.

3. Our criminal justice system should not ignore the fact that juries sometimes convict innocent persons and that on many occasions defendants have been exonerated long after they had been convicted. See Richard C. Dieter, Innocence And The Death Penalty: The Increasing Danger of Executing the Innocent, July 1997 (sequel to a 1993 Staff Report of the Subcommittee on

independent aggravating factor and limited evidence of absence of remorse to proving the future dangerousness aggravating factor. Id. at 946. The court justified its ruling as necessary to protect defendant's exercise of his constitutional rights not to testify and to require the government to prove its case beyond a reasonable doubt:

> "Lack of remorse is a subjective state of mind, difficult to gage objectively since behavior and words don't necessarily correlate with internal feelings. In a criminal context, it is particularly ambiguous since guilty persons have a constitutional right to be silent, to rest on a presumption of innocence and to require the government to prove guilt beyond a reasonable doubt. To allow the government to highlight an offender's lack of remorse undermines these safeguards. Without passing on whether lack

Civil and Constitutional Rights, Judiciary Committee, U.S. House Of Representatives) (summarizing 69 cases where persons have been released from death row since 1973 after evidence of their innocence had emerged) ; see also M. Radelet, H. Bedau, C. Putnam, In Spite Of Innocence, at 17 (Northwestern University Press 1992) (recording more than 400 cases of innocent persons convicted of capital or potentially capital crimes in this country since 1900).

14. Even in non-capital cases, some state courts preclude evidence of lack of remorse to enhance a defendant's sentence where the defendant has entered a denial of guilt. See Arizona v. Tinajero, 188 Ariz. 350, 935 P.2d 928, 935 (AZ. Ct. App. 1997) ("When a convicted person maintains his innocence through sentencing, as Tinajero did here, his failure to acknowledge guilt 'is irrelevant to a sentencing determination' and 'offends the Fifth Amendment privilege against self-incrimination.'") People v. Holguin, 213 Cal. App.3d 1308, 1319, 262 Cal. Rptr. 331, 337 (1989)

of remorse is per se an inappropriate independent factor to consider, the court finds it inappropriate in this case. The only information proposed to sustain the factor is DAVIS' alleged jubilation in learning that Kim Groves had been killed. The government does not propose to introduce evidence of continuing glee, or boastfulness, or other affirmative words or conduct that would indicate a pervading and continuing lack of remorse. Furthermore, as already noted, the allegation of lack of remorse encroaches dangerously on an offender's constitutional right to put the government to its proof."

(defendant's lack of remorse may not be used as a sentencing factor where the defendant has denied guilt and the evidence of guilt is conflicting).

912 F. Supp. at 946; cf. United States v. Nguyen, 928 F. Supp. 1525 (D. Ks. 1996) (denying motion to strike aggravator, but cautioning government that its evidence must be "more than mere silence," relevant, reliable, and "its probative value must outweigh any danger of unfair prejudice").

Moreover, while evidence that a defendant's lack of remorse may be admissible to rebut a proposed mitigating factor that the defendant is remorseful for his conduct, the absence of remorse is not a valid aggravating factor. See pp. 26-27 (low potential for rehabilitation factor), supra. The aggravating factor is also unconstitutionally duplicative (as is the low potential for rehabilitation factor) because it improperly overlaps with the future dangerousness non-statutory aggravating factor (#4) - The government's attempt to use the same evidence to justify. multiple aggravating factors renders them unconstitutionally duplicative. Contra United States v. Nguyen, 928 F. Supp. 1525, 1542 (D. Ks. 1996) (ruling that lack of remorse does not appear to duplicate continuing danger factor). Finally, given the factor's duplicative nature, improper use in aggravating, and vagueness, and the risk that it may deprive defendant of his Fifth Amendment right to remain silent and right to reliable sentencing under the Eighth Amendment and Due Process Clause, the Court should also dismiss this factor because its probative value is outweighed by the danger of unfair prejudice under section 3593 (c) . See United States v. Walker, 910 F. Supp. 837 (N.D. N.Y. 1995) (dismissing lack of remorse aggravator on this ground).(15)

4. The defendant represents a continuing danger to the lives and safety of other persons.

Many death penalty sentencing schemes provide that evidence that a defendant may be a danger in the future may be admitted in aggravation. **See. e.g., Jurek v. Texas, 428 U.S. 262, 274-76 (1976) (upholding use of future dangerousness provision in Texas statute).** Because Congress chose not to include such a "future dangerousness" provision within the enumerated aggravating factors, Congress intended that this general factor not be considered as a separate aggravating factor. Cf. West Coast Truck Lines v. Arcata Comm. Recycling, 846 F.2d 1239, 1244 (9th Cir.) ("When

some statutory provisions expressly mention a requirement, the omission of that requirement from other statutory provisions implies that Congress intended both the inclusion of the requirement and the exclusion of the requirement."), cert. Denied, 485 U.S. 856 (1988).

Instead of adopting a general "future dangerousness" provision, Congress chose to set forth several specific statutory aggravating factors regarding the defendant1s past conduct, including a prior felony conviction involving use or attempted or threatened use of a firearm under § 3592(c) (2) , a prior conviction for an offense carrying a maximum penalty of life imprisonment or death under § 3592(c) (3), two or more prior felony convictions for offenses involving serious bodily injury or death under § 3592(c) (4), two or more prior felony convictions for distributing a controlled substance under § 3592 (c) (10), and a prior conviction for sexual assault or child molestation under § 3592(c) (15). Mr. Kaczynski does not fall within any of these statutory aggravating factors. The government cannot simply create a new aggravating factor by transcending the limits of these factors in order to encompass Mr. Kaczynski's background; under the general category of "future dangerousness" with a subcategory of "pattern of past violent acts." Congress implicitly rejected the use of such a broad aggravating factor.

Furthermore, even if this aggravator were permitted by the death penalty statute, the factor can satisfy the Fifth and Eighth Amendments only if the government limits its evidence and argument (and the jury is so instructed) to showing that the defendant poses a continuing danger to the lives and safety of others while serving a sentence of life imprisonment without parole. Otherwise, this aggravating factor violates the rule of Simmons v. South Carolina, 512 U.S. 154 (1994).

15. In light of the serious constitutional concerns underlying use of this aggravating factor, it is not surprising that a number of states prohibit use of this factor. See, e.g., North Carolina v. Brown, 320 N.C. 179, 198-99, 358 S.E.2d 1, 15, cert. Denied, 484 U.S. 970 (1987); McCampbell v Florida, 421 So.2d 1072, 1075 (1982); People v. Thompson, 45 Cal 3d 86, 12324, 753 P.2d 37, 59-60, 246 Cal. Rptr. 245, 267-68 (1988).

In Simmons, the prosecution argued that the jury should sentence the defendant to death because, in part, of his future dangerousness. Id. at 157. The trial court rejected the defendant's request to rebut the allegation of future dangerousness by informing the jury that he was ineligible for parole and would serve the rest of his life in prison if the jury returned a life sentence. Id. at 158-60. The Supreme Court held that, where the prosecution puts a defendant's future dangerousness in issue, the Due Process Clause requires that the jury be informed that the defendant would remain in prison for the remainder of his life if the defendant is indeed ineligible for parole when sentenced to life imprisonment. Id. at 171 (plurality opinion); id. at 177 (O'Connor, J., joined by Rhenquist, J., and Kennedy, J.).

The Due Process principle underlying Simmons and the Eighth Amendment's heightened need for reliability (16) necessarily restrict the government's continuing danger non-statutory aggravating factor to proof

that defendant is a continuing danger while in prison. Under the 1994 federal death penalty statute, the jury has the option of sentencing the defendant "to death, to life imprisonment without possibility of release or some other lesser sentence." 18 U.S.C. § 3593(e). If the jury recommends life imprisonment without release, the court must impose that sentence. 18 U.S.C. § 3594. The government's argument that the defendant should be put to death based on aggravating evidence that the defendant would continue to be a danger to the community is misleading because the jury can ensure through its verdict that a defendant serves the rest of his life in prison.

In United States v. Flores, 63 F.3d 1342 (5th Cir.), cert denied, 117 5. Ct. 87 (1995), the defendant argued that the prosecution improperly relied on defendant's future dangerousness because it knew that anything less than a life sentence was unlikely. Id. at 1368. Under the provisions of the applicable death penalty law in Flores's case, the defendant could have received a sentence of less than life imprisonment even if the jury recommended a sentence of life imprisonment without possibility of release. 63 F.3d at 1367-68; 21 U.S.C. § 848(k) & (1). Nonetheless, the Fifth Circuit, in dicta, explained that. the government's future dangerousness evidence should be restricted to defendant's danger while in prison in any case where there is little likelihood that a defendant would ever be released:

16. The Court in Simmons relied on the Due Process Clause for its holding, reserving judgment on whether its decision was also compelled under the Eighth Amendment. 512 U.S. at 162 n.4; but see Id. at 172 (Souter, J., concurring, joined by Stevens, J.) (Eighth Amendment also entitles defendant to inform his jury about his parole eligibility).

> "Garza further urges that, even if the government did not violate the express holding of Simmons, its emphasis on future dangerousness was inappropriate because it knew anything less than a life sentence was unlikely. However, the record clearly shows that the government primarily focused on the danger Garza would pose while still in prison, making Garza's case materially different than Simmons . . . . This does not mean that district courts should allow the government to freely hammer away on the theme that the defendant could some day get out of prison if that eventuality is legally possible but actually improbable. . . .If the court knows a twenty-year sentence is highly unlikely, it should. in its discretion. preclude the government from arguing that the defendant may be tree to murder again two decades hence. But that is not what happened in Garza's case, and we see no error in the way the district court handled the issue."

Flores, 63 F.3d at 1368-69 (emphasis added) Here, where a jury's verdict of life imprisonment ensures that the defendant will never be released from prison, the prosecution's aggravating factor should be limited to evidence of defendant's continuing danger while serving a mandatory life sentence.

5. The defendant caused severe and irreparable harm to the families of

three murder victims and caused life altering injuries to the survivors of his acts of violence.

This alleged non-statutory aggravating factor violates the federal death penalty statute and the Fifth and Eighth Amendments by relying on "victim impact" evidence unrelated to the harm caused by the capital offense charged in this proceeding.

The 1994 death penalty statute bars aggravating factors that are based on victim impact evidence that is unrelated to the charged capital crime. Although section 3593(a) permits the government to allege aggravating factors concerning the effect of "the offense" on the victim and victim's family, it limits these factors to those concerning "the offense" for which the defendant is subject to a potential death sentence. 18 U.S.C. § 3593(a) states, in relevant part:

> "The factors for which notice is provided under this subsection may include factors concerning the effect **of the offense** on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim **of the offense** and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information."

(Emphasis added). This reading of the statute is bolstered by the choice of aggravating factors Congress included in section 3592 (c). Besides listing certain enumerated criminal convictions as aggravating factors, section 3592(c) sets forth nine aggravating factors that all concern circumstances of the charged offense. Section 3592(c)'s final "catch-all" category permits a jury to "consider whether any other aggravating factor for which notice has been given exists." But this category of factors should be read in the context of the factors enumerated in that same section of the statute. By setting forth specific aggravating factors that relate to the circumstances of the capital crime for which defendant is on trial, Congress necessarily intended to bar other factors that do not relate to the charged offense. See National Labor Relations Board v. A-Plus Roofing, Inc., 39 F.3d 1410 (9th Cir. 1994) (catch-all section of magistrate judges' powers is limited by the listing of the judges' enumerated powers in that same section); see also Defendant's Motion to Preclude Imposition of The Death Penalty, Argument Section IV(A).

Furthermore, if the statute is interpreted to permit the government to present victim impact evidence unrelated to the offense for which defendant faces a potential death sentence, the statute cannot pass scrutiny under the Eighth Amendment.(17) The emotionally charged nature of so-called "victim impact" evidence has long been recognized as likely to inflame a jury and thereby increasing the risk that a death sentence will be imposed for arbitrary or impermissible reasons. See. e.g., Louisiana v. Bernard, 608 So.2d 966 (La. 1992) ("Victim impact evidence, by its very nature, is emotionally charged material which involves the risk of injecting arbitrary factors into a capital sentencing hearing.") ; Cargle v. Oklahoma, 909 P.2d 806, 830 (Okla. Crim.

App.) ("The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk the defendant will be deprived of Due Process."), cert. denied, 117 S. Ct. 100 (1996); Jonathan H. Levy, Note, Limiting Victim Impact Evidence And Argument After Payne. V. Tennessee, 45 Stanford Law Rev. 1027, 1041 (1993) ("Victim impact statements are often prejudicial, and prejudicial evidence, by its very nature, cannot be defended against because it inflames the emotions of the jurors to the point where they will no longer credit defense testimony.").

In Booth. v. Maryland, 482 U.S. 496 (1987), the Supreme Court held two categories of so-called "victim impact" evidence inadmissible in capital sentencing under the Eighth Amendment. The Court first ruled that evidence of the personal trauma suffered by the victim's family and of the personal characteristics of the Victim "is irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." Id. at 502-03; accord, South Carolina v. Gathers, 490 U.S. 805 (1989). The Court also held that the Eighth Amendment barred evidence of the family members' opinions and characterizations of the crime because such evidence served "no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Id. at 508.

In erecting an absolute Eighth Amendment bar to victim impact evidence, the Court relied primarily on two rationales. First, since capital sentencing is concerned with "the personal responsibility and moral guilt" of a particular defendant, Enmund v. Florida, 458 U.S. 782, 801 (1982), the character and reputation of the victim and the effect of the crime on his or her family is irrelevant. Booth., 482 U.S. at 504-05. Second, permitting the life or death sentencing determination to turn on factors, such as the degree to which a family is willing and able to express grief, or the status of the victim in the community, "creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." Id. at 496-97.

> "But in some cases the victim will not leave behind a family, or the family members may be less articulate in describing their feelings even though their sense of loss is equally severe. The fact that the imposition ot the death sentence may turn on such distinctions illustrates the danger of allowing juries to consider this information."

17. By expressly limiting "victim impact" aggravating factors to those that relate to "the offense" for which the defendant faces a potential death sentence, Congress intended to avoid the Eighth Amendment violation that would result if the government could present virtually limitless evidence concerning the effect of other crimes on victims and their families. See United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366 (1909) (courts should choose construction of statute that avoids constitutional questions).

Id. at 496. The Court concluded that victim impact evidence "does not provide a 'principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not.'" Id. at 506 (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (opinion of Stewart, J.).

Four years later, in Payne. v. Tennessee, 501 U.S. 808 (1991) , the Court abruptly reversed course(18) and held that the Eighth Amendment does not per se prohibit a capital sentencing jury from considering victim impact evidence, overruling Booth. v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989). In doing so, the Court rejected the view that evidence of the impact of an offense on the victim's survivors is barred in the penalty phase of a capital trial because it does not reflect on the "blameworthiness" of a particular defendant. Payne., 501 U.S. at 819.

The Court reasoned that a capital jury should be able to consider the harm caused by the charged crime, as sentencers have traditionally been permitted in determining punishment:

> "The assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment."

Id. (emphasis added). However, the Court's opinion focused solely on whether the Eighth Amendment barred evidence of the harm caused by the crime for which the defendant had been sentenced to death. See e.g. id. at 820 ("Wherever judges in recent years have had discretion to impose sentence, the consideration of the harm caused by the crime has been an important factor in the exercise of that discretion") (emphasis added) ; id. at 821 ("Congress and most states have, in recent years, enacted similar legislation to enable the sentencing authority to consider information about the harm caused by the crime committed by the defendant.")(emphasis added); Id. at 825 ("Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, (emphasis added). The Court concluded that, because a defendant was permitted to introduce any relevant mitigating evidence, a per se bar of all victim impact evidence would result in a skewed presentation of evidence at a sentencing hearing:

> "This misreading of precedent in Booth. has, we think, unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering a "quick

18. The reversal resulted from a change of membership in the Court. Justices Brennan and Powell, who were in the Booth. majority left the Court; their two replacements, Justices

glimpse of the life" which a defendant "chose to extinguish," . . . . or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide."

Kennedy and Souter, joined the Payne. majority in voting to overrule Booth.

id. at 822 (emphasis added). Thus, to balance the scales, the Court held that the Eighth Amendment does not prohibit limited victim impact evidence, consisting of a "quick glimpse" of the victim's life and evidence showing the harm resulting to the victim's family as a result of the charged offense.

The government's fifth non-statutory aggravating factor would stretch the introduction of victim impact evidence in a capital trial far beyond that approved in Payne. or permitted under our Constitution. It is one thing to say, as the Payne. court did, that the Eighth Amendment does not erect a per se bar to all evidence concerning the capital victim or the effect of the death on the victim's family, so as not to tip the presentation of the evidence too far towards the defendant. It is entirely another to permit the introduction of victim impact evidence at a capital sentencing hearing with respect to offenses and acts of violence in addition to the capital crime itself.

Payne. explained that a state could allow the prosecution to present some victim impact evidence with respect to the charged crime in order to provide the jury with a full picture of the circumstances of the offense. The Court, however, did not address the admissibility of victim impact evidence concerning offenses or acts unrelated to the charged crime. The rationale underlying Payne. demonstrates that the Eighth Amendment would bar a broad, range of victim impact evidence relating to a defendant's prior offenses. Payne. justifies the introduction of some evidence of the loss to the victim's family and a "quick glimpse" of the victim as helpful to the jury's assessment of the harm caused by the offense for which the defendant is to be sentenced. Evidence concerning the effect of other offenses that a defendant may have committed in the past is irrelevant to establishing the harm caused by the charged offense. Permitting the government to present such evidence would serve only to interject an impermissible risk of inflaming the jury and producing an arbitrary and unreliable death verdict.

The Court in Payne. specifically noted that its decision left intact other aspects of the Booth. opinion, which held that other categories of victim impact evidence were prohibited by the Eighth Amendment. 501 U.S. at 830 n.2; id. at 833 (O'Connor, J., concurring, joined by White, J., and Kennedy, J.); id. at 835 n.l (Souter, J., concurring, joined by Kennedy, J.) . In particular, Booth. remains the law of the land with respect to its view that "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." Id. at 830 n.2; see also Louisiana v. Taylor, 669 So.2d 364, 369-70, cert. denied, 117 S. Ct. 162 (1996); New Jersey v. Muhammad, 145 N.J. 23, 47, 678 A.2d 164, 176 (1996); Ohio v. Fautenberry 72 Ohio St.3d 435, 438-40, 650 N.E.2d 878, 882, cert. denied, 116 5. Ct. 534 (1995). Under Booth, this category of evidence was banned under the Eighth Amendment because it "serve(s] no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the

crime and the defendant." 482 U.S. at 508.

Likewise, the category of victim impact evidence involved here, evidence from crimes unrelated to the charged offense, violates the Eighth Amendment. Its admission would lead to numerous "mini-trials" regarding the effect of prior offenses on victims and their survivors, multiplying the risk found unacceptable in Booth.: that the capital sentencing decision will be made in an arbitrary manner or for an impermissible reason. Booth., 482 U.S. 502, 505.

Moreover, as alleged, the victim impact aggravating factor is also unconstitutionally duplicative, vague, and overbroad. It duplicates the first non-statutory aggravating factor because both factors rely on the same allegations that defendant has committed other crimes and acts of violence. There is no meaningful distinction between a factor based on other criminal acts and one that relies on the harm caused by such acts. "Such double counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." United States v. McCullah, 76 F.3d 1087, 1111, aff'd on denial of reh'g, 87 F.3d 1136 (10th Cir. 1996), cert. denied, 117 5. Ct. 1699 (1997). Because the sentencer is asked to weigh the same factor twice in its decision, "a reviewing court cannot 'assume it would have made no difference if the thumb had been removed from death's side the scale.'" Id. at 1112 (quoting Stringer, 503 U.S. at 232).

The factor is also unconstitutional by referring to other acts and victims without identifying the alleged conduct or harms and by using vague terms, such as "severe and irreparable harm" and "life altering injuries." The factor fails to "channel the sentencer's discretion by 'clear and objective' standards that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process of imposing a sentence for death.'" Lewis v. Jeffers, 497 U.S. 764, 774 (1990) (quoting Godfrey, 446 U.S. at 428).
